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15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 BAO YI FANG, WEI WANG, and)	Case No.: C07-04882 JL
18 LIANG XIAN FU,)	SUPPLEMENTAL BRIEF IN
19 Plaintiff,)	OPPOSITION TO MOTION FOR
20 vs.)	LEAVE TO AMEND
21 SHANGHAI GOURMET, LLC,)	
22 Defendants.)	Under Submission
23	Dept: 16, Hon. James Larson

24 **1. Introduction**

25 After the hearing on July 2, 2008, the Court requested additional briefing with respect to
 26 Count Six of the proposed First Amended Complaint, pursuant to which Plaintiffs BAO YI
 27 YANG (“Yang”), WEI WANG (“Wang”), LIANG XIAN FU (“Fu”) (collectively, “Plaintiffs”)
 28 seek to bring a claims “on behalf of all current and former employees” of Defendant
 SHANGHAI GOURMET LLC (“Shanghai Gourmet”). This proposed cause of action is brought
 pursuant to Labor Code §2699, California’s Private Attorney General Statute, which was enacted
 in 2003 (“PAGA”).

1 **2. Relevant Facts**

2 Defendant Shanghai Gourmet, LLC, operated two (2) Chinese restaurants from 2000 to
3 2007. It now operates only one. (Shen Declaration in Opposition to Motion to Amend Complaint
4 ("Decl", ¶2)

5 It has about thirty (30) former employees and twelve (12) current employees. The
6 only three (3) employees to ever complain of any wage and hour problems are the Plaintiffs.
7 (Decl, ¶3)

8 Defendant denies any wrongdoing. Plaintiffs were paid more than the applicable hourly
9 wage for all work performed and received additional benefits such as housing, meals, a break
10 between lunch and dinner, and transportation to and from work. (Decl, ¶4)

11 This litigation has already caused Defendant and its owners financial hardship, expanding
12 the lawsuit to involve thirty-nine additional (39) employees and potential plaintiffs will cause
13 even greater hardship on them. (Decl, ¶5)

14 **3. PAGA**

15 Labor Code §2699¹(a), provides, in pertinent part, that any provision of the Labor Code
16 that:

17 provides for a civil penalty to be assessed and collected by the Labor and Workforce
18 Development Agency or any of its departments, divisions, commissions, boards,
19 agencies, or employees, for a violation of this code, may, as an alternative, be recovered
20 through a civil action brought by an aggrieved employee on behalf of himself or herself
21 and other current or former employees pursuant to the procedures specified in Section
22 2699.3.

23 §2699.3 provides various administrative procedures required before Plaintiffs may seek relief on
24 behalf of other current or former employees. Any penalties are paid "75% to the Labor and
25 Workforce Development Agency ... and 25% to the aggrieved employees". §2699(i)
26

27 ¹Unless otherwise indicated, all statutory references are to the California Labor Code.

1 In analyzing, §2699 and 2699.3, the Court in *Caliber Bodyworks v. Superior Court* 134
 2 Cal.4th 365,367, observed that “wage and hour disputes (and others in the same general class)
 3 routinely proceed as class actions”, *citing Prince v. CLS Transportation, Inc.* (2004) 118
 4 Cal.App.4th 1320, 1328.

5 Two cases filed pursuant to PAGA were brought as class actions. *Aguiar v. Cintas Corp.*
 6 (2006) 144 Cal.App.4th 121; *Dunlop v. Superior Court* (2006) 142 Cal.App.4th 330.

7 At the hearing, counsel for Plaintiffs stated that there were two cases which held that
 8 actions under PAGA need not brought as class actions, but that one was not citeable.

9 Undersigned counsel could only find one case, *Arias v. Superior Court* (2007) 153 Cal.App.4th
 10 777, which is not citeable because the California Supreme Court de-published it.

11 In *Arias*, the plaintiff employee brought claims pursuant to PAGA and Business
 12 Professions Code §17200 on behalf of himself and in his representative capacity for the interest
 13 of other current and former employees. The court first held that Plaintiff’s claims pursuant to
 14 Business and Professions Code §17200 could only be brought as a class action. The Court then
 15 held that because, in its view, restitution is not the primary object of a PAGA action, it need not
 16 be brought as a class action. 153 Cal.App.4th 777. Angelo Dairy, the real party in interest
 17 pointed out that the only way a plaintiff can recover on behalf of an unnamed employee was
 18 through a class action and that because aggrieved employees are entitled to 25 percent of any
 19 penalty, there are fiduciary and constitutional concerns, and that class action procedures are
 20 required to ensure that no absent class member is deprived of the opportunity to independently
 21 press his claim.

22 Despite these concerns, the court in *Arias* allowed the plaintiff to proceed on behalf of the
 23 other employees. The Supreme Court promptly de-published *Arias* and granted review.²

25 ²According to the Supreme Court’s website, no final decision has been issued yet.
 26 briefing has been completed with respect to the issue of whether an employee who is pursuing
 27 claims under PAGA must bring them as a class action.

1 It now appears that there is no longer any good caselaw allowing Plaintiffs to bring a
 2 PAGA claim on behalf of current and former employees without bringing it as a class action.

3 **4. Leave to Amend Should be Denied**

4 While leave to amend is liberally granted, it remains the moving party's burden to give a
 5 reason why justice requires leave to amend. *Shipner v. Eastern Airlines, Inc.*, 868 F.2d 401,406-
 6 406. If the moving party meets that burden, then the opposing party may make a showing that
 7 leave to amend should not be granted because of prejudice to the opposing party, bad faith by the
 8 moving party, or futility of amendment. *Bowles v. Reade*, 198 F.3rd 752,758 (9th Cir. 1999)
 9 Prejudice can be established where the proposed new claims greatly change the nature of the
 10 litigation or the potential claims are futile. *Morongo Band of Indians v. Rose*, 893 F.2d 1074 (9th
 11 Cir. 1990)(“amending complaint to allege claims under RICO greatly changed the nature of the
 12 litigation and justified denial of leave to amend”)

13 Plaintiffs did not initially bring this action in a representative capacity. When given an
 14 opportunity at the hearing, Plaintiffs' counsel could provide no reason why this lawsuit was not
 15 originally brought by the Plaintiffs in their representative capacity. Given that failure to provide
 16 an explanation, one is left with two conclusions: (1) that there is no reason which requires such
 17 an amendment, and (2) that the amendment is being sought in bad faith to achieve a leverage on
 18 the current claims.

19 If permitted to now bring this case in a representative capacity, presumably, as a class
 20 action³, Defendant would, one year into the litigation, be put in the position of having to defend
 21 39 new claims, with the attendant discovery expense of responding to a fishing expedition, the
 22 effect on the financial privacy of the 39 other employees, and a likely fatal disruption to what is
 23 left of their restaurant business. Given this prejudice, leave to amend should be denied.

24
 25 ³The alternative to a class action might be for Plaintiffs to attempt to join the other 39,
 26 presumably unwilling, current and former employees, or to substitute themselves in as Plaintiffs,
 27 this time in a representative capacity “on behalf of current and former employees”. Either way,
 28 there are procedural concerns which are ignored by Plaintiffs.

1 **5. Conclusion**

2 For the reasons stated above, Defendant requests that Plaintiffs be denied leave to amend,
3 at least with respect to Count 7, the PAGA Claim.

4
5 Dated: July 11, 2008

DOWNING LAW FIRM

6 By: /s/
7 John G. Downing, Attorneys for
Defendant Shanghai Gourmet LLC